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JACQUELINE E. HARTT, PH.D Allen Dyer Doppelt Milbrath & Gilchrist, P.A. 255 S. Orange Ave., Suite 1401 P.O. Box 3791 ORLANDO, FL 32801-3791			GISHNOCK, NIKOLAI A	
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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* BERNARD KUCINSKI and JOSE GONZALEZ

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Appeal 2009-005630  
Application 10/765,749  
Technology Center 3700

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Decided: April 28, 2010

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*Before:* JENNIFER D. BAHR, STEFAN STAICOVICI, and KEN B.  
BARRETT, *Administrative Patent Judges.*

BAHR, *Administrative Patent Judge.*

DECISION ON APPEAL

### STATEMENT OF THE CASE

Bernard Kucinski and Jose Gonzalez (Appellants) appeal under 35 U.S.C. § 134 (2002) from the Examiner's decision rejecting claims 1-25. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

#### *The Invention*

Appellants' claimed invention is directed to processing and scoring test answer sheet images that include answers to open-ended questions.  
Spec. 1:15-17.

Claim 1, reproduced below, is illustrative of the claimed invention.

1. A method for scoring an answer page containing an answer to an open-ended question, the method comprising the steps of:
  - viewing a first visual image of a first portion of an answer page, the first portion comprising an answer space in which an answer to an open-ended question is expected to reside;
    - if the first portion of the answer page contains a complete answer, electronically scoring the answer;
    - if the first portion of the answer page does not encompass a complete answer, accessing and viewing a second visual image of a second portion of the answer page, the second portion comprising a sector of the answer page outside the answer space, and electronically scoring the answer.

#### *The Rejections*

The Examiner relies on the following evidence:

Poor	US 5,672,060	Sep. 30, 1997
Clark	US 5,321,611	Jun. 14, 1994

Walker	US 6,093,026	Jul. 25, 2000
Martinez	US 5,211,564	May 18, 1993
Bier	US 5,581,670	Dec. 3, 1996

The Examiner makes the following rejections:

*Under 35 U.S.C. § 102(e):*

- (A) Claims 1-8, 13, 14, and 17-25 as anticipated by Poor.

*Under 35 U.S.C. § 103(a):*

- (B) Claims 9, 15, and 16 as unpatentable over Poor and Clark.  
(C) Claim 10 as unpatentable over Poor and Walker.  
(D) Claim 11 as unpatentable over Poor and Martinez.  
(E) Claim 12 as unpatentable over Poor, Martinez, and Bier.

#### SUMMARY OF DECISION

We AFFIRM.

#### OPINION

##### *Rejection A - Poor*

Appellants argue claims 1-6, 8, 13, 14, 17-23, and 25 as a first group. Appeal Br. 5. We select claim 1 as representative of the first group. 37 C.F.R. § 41.37(c)(1)(vii) (2007). Appellants argue dependent claims 7 and 24 as a second group. Appeal Br. 7-8. We select claim 7, which depends from claim 1, as representative of the second group. 37 C.F.R. § 41.37(c)(1)(vii).

The dispositive issue with respect to rejection A is whether Poor describes each limitation of claim 1, and in particular, a first portion of an answer page that contains a complete answer.

Appellants focus their arguments on whether Poor describes "a sector of the answer page outside the answer space." Reply Br. 2, Appeal Br. 5-6. However, claim 1 presents two alternative steps, based upon whether "the first portion of the answer page contains a complete answer":

1) "electronically scoring the answer," if the first portion contains a complete answer, or 2) "accessing and viewing a second visual image of a second portion," and then "electronically scoring the answer," if the first portion of the answer page does not encompass a complete answer.

Inasmuch as claim 1 does not require that more than one answer page portion be viewed, or that answer page portions containing a complete answer *and* answer page portions not encompassing a complete answer be encountered, the claimed method is met if either of the last two conditions, and consequent step, is satisfied.

When a claim contains alternatives, the claim is anticipated if any of the alternatives is known in the prior art. *See Brown v. 3M*, 265 F.3d 1349, 1351 (Fed. Cir. 2001) (*citing Titanium Metals Corp. of America v. Banner*, 778 F.2d 775, 782 (Fed. Cir. 1985)). The Examiner found in part that Poor describes the first alternative step: when the first portion of the answer page contains a complete answer and the answer is scored. Ans. 3. Appellants do not challenge the Examiner's finding.

We find that Poor describes a step of electronically scoring an answer, if the first portion of the answer page contains a complete answer. *See* col. 8, ll. 53-60, fig. 8 (depicting image 25, containing an answer); col. 9, ll. 6-12, fig. 8 (describing that, if the entire image does not fit on one screen, a routine is included to scroll the image smoothly up and down on the screen to allow the scorer to view the entire image [the complete answer]); col. 9, ll.

14-24, fig. 9 (describing that the answer is electronically scored in window 28). Thus, the record before us supports the Examiner's finding that Poor anticipates claim 1.

Claim 7, which includes all of the limitations of claim 1, adds the alternative step of viewing a second answer page when the first answer page does not encompass a complete answer. Thus, Poor anticipates claim 7 when, as described above, the first answer page does encompass a complete answer.

*Rejection B - Poor and Clark*

Appellants argue claim 9 and claims 15 and 16 as two separate groups. Appeal Br. 8-10. However, in arguing claims 15 and 16, Appellants do not argue any particular limitations of claims 15 and 16, but rather argue that Clark does not teach a "second visual image" as recited in claim 1. Appeal Br. 10. As discussed above, Poor describes completing the method of claim 1 without viewing a "second visual image" when the first portion of the answer page contains a complete answer and the answer is scored. Thus, the Appellants' arguments with respect to claims 15 and 16 are not persuasive.

The dispositive issue with respect to claim 9 of rejection B is whether Poor and Clark, in combination, render obvious "electronically transmitting a query to a supervisor" "if a question occurs during the scoring step."

Appellants argue that a "test item" is transferred to the resolver (supervisor), not a "query" as recited in claim 9. Reply Br. 4. Appellants thus focus the argument on whether Clark describes a "query" verbatim. However, as pointed out by the Examiner (Ans. 6), we find that Clark

teaches that when a discrepancy as to what score should be assigned (i.e., a question) occurs, then a request (i.e., a query) to settle the dispute is transmitted by the system (thus, the query is electronic) to a supervisor (i.e., the resolver with the authority over the other resolvers to answer the query). Clark, col. 7, ll. 36-41. We find that the transmittal of the electronic request to the supervisor is itself a query to that supervisor to settle the question at hand: how should this test item be scored? Therefore, the Examiner did not err in finding that Clark describes a query electronically transmitted to a supervisor.

*Rejection C - Poor and Walker*

Appellants argue that the Examiner has misunderstood "verbal" to mean "oral" when "verbal" means "written or spoken verbiage," such that the Examiner's modification of Poor's answer scoring method, using written answers, to include oral answers as described in Walker, is "inappropriate." Appeal Br. 10-11.

The dispositive issue with respect to rejection C is whether Poor and Walker, in combination, render obvious a method for scoring an answer page, wherein the answer is "verbal," given that Poor describes written answers, and Walker describes oral answers. The Examiner's rejection addresses both interpretations of the term "verbal," according to Appellants' usage of the term. Thus, Appellants' argument that the Examiner's rejection is "inappropriate" because it accommodates both meanings of the word is simply not persuasive of any error in the rejection.

*Rejection D - Poor and Martinez*

Appellants argue that while Martinez describes a "geometric tool on a computer screen to provide an answer to a test item," the "present invention recites that the answer provided by the examinee is a geometric diagram, which is scanned and presented to a human scorer as an image." Reply Br. 6.

The dispositive issue with respect to rejection D is whether the Examiner's proposed combination of Poor and Martinez renders obvious an answer scoring method "wherein the answer comprises a geometric diagram," as recited in claim 11. Contrary to Appellants' argument (Reply Br. 6), claim 11 does not require the scanning of images. Claim 11 merely requires that "the answer comprises a geometric diagram."

The Examiner found that Martinez describes an answer comprising a geometric diagram, such as a line, and concluded that it would have been obvious to incorporate this type of answering in Poor's system to allow for figural responses to test items. Ans. 7. Appellants do not challenge this finding or the conclusion that the combination proposed by the Examiner, which appears to be nothing more than using a known method for supplying geometric responses to improve Poor's answer reviewing and scoring system, would have been obvious. Therefore, Appellants' arguments are unpersuasive.

*Rejection E - Poor, Martinez, and Bier*

Appellants argue that Martinez does not describe supplying a human scorer with a geometric tool for making measurements of a visual image, and that Bier is not directed to scoring assessments. Reply Br. 6.

The dispositive issue with respect to rejection E is whether Poor, which teaches an answer scoring system, Martinez, which teaches a pictoral response testing system, and Bier, which teaches a tool for making measurements on a computer screen, in combination, render obvious the method of claim 12, including a step of "accessing an electronically manipulable display of a geometric tool for assessing the geometric diagram."

Contrary to Appellants' argument (Reply Br. 6), claim 12 does not require a human scorer to have a geometric tool for measuring a visual image. Instead, claim 12 merely requires "a geometric tool for assessing the geometric diagram."

The Examiner found that Bier teaches a geometric tool for assessing a geometric item. Ans. 7. Appellants do not challenge the Examiner's finding. Instead, Appellants argue that Bier "is not directed to scoring assessments." However, "[c]ommon sense teaches [] that familiar items may have obvious uses beyond their primary purposes." *KSR*, 550 U.S. at 420. In this case, it is common sense that a geometric tool for assessing a geometric item could be used to assess a geometric item in a test setting. Appellants do not present any particular arguments as to why the Examiner's proposed combination is lacking any claimed features or why the articulated reason for making the combination lacks rational underpinning. Thus, Appellants' arguments are unpersuasive.

## CONCLUSIONS

- (A) Poor describes the method of claim 1, in particular, a first portion of an answer page that contains a complete answer. Similarly, Poor describes the method of claim 7.
- (B) The Examiner's proposed combination of Poor and Clark renders obvious an answer scoring method including "electronically transmitting a query to a supervisor" "if a question occurs during the scoring step," as recited in claim 9.
- (C) The Examiner's proposed combination of Poor and Walker renders obvious a method for scoring an answer page, wherein the answer is "verbal," as recited in claim 10.
- (D) The Examiner's proposed combination of Poor and Martinez renders obvious an answer scoring method "wherein the answer comprises a geometric diagram," as recited in claim 11.
- (E) The Examiner's proposed combination of Poor, Martinez, and Bier renders obvious the method of claim 12 including a step of "accessing an electronically manipulable display of a geometric tool for assessing the geometric diagram."

## DECISION

The Examiner's decision is affirmed as to claims 1-25.  
No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

Appeal 2009-005630  
Application 10/765,749

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